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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9 CELSO LEON,

10 Petitioner,

No. CIV S-04-2631 FCD JFM P

11 vs.

12 A. P. KANE, Warden, et al.,

13 Respondents.

FINDINGS AND RECOMMENDATIONS

14 _____/
15 Petitioner is a state prisoner proceeding pro se with an application for a writ of
16 habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is serving a sentence of 15 years to life,
17 plus a two year enhancement, following his 1986 conviction on charges of second degree murder
18 with the use of a firearm. Petitioner challenges the January 23, 2001 decision of the California
19 Board of Prison Terms (Board) to deny him a parole date. Petitioner contends that he was
20 deprived of a constitutionally protected liberty interest without sufficient evidence; that the Board
21 abused its discretion by its arbitrary and capricious use of its regulations; and that the Board
22 violated his right to due process by applying the “some evidence” standard in a manner contrary
23 to law or by an unreasonable application of established Supreme Court authority.

24 PROCEDURAL HISTORY

25 1. The decision to deny parole became final on February 16, 2001. Petitioner
26 filed an appeal. (Answer, Ex. D.) The appeal was denied with one exception – because the

psychological reports did not include evidence petitioner suffers from any mental health issues, the parole decision was modified by removing all references to therapy. (Id.) The appeals unit found that there was ample evidence to support the unsuitability finding. (Id.)

2. On May 8, 2002, petitioner filed a petition in the Fresno County Superior Court challenging the Board's decision. Respondents believe that petition was denied.

3. Petitioner filed a petition for writ of habeas corpus in the Court of Appeal, Fifth Appellate District, which was summarily denied on July 29, 2004. (Answer, Ex. F.)

4. Petitioner's petition for review was denied by the California Supreme Court on October 20, 2004, en banc and without comment. (Answer, Ex. F.)

5. Petitioner filed the instant action on December 13, 2004.

STATEMENT OF FACTS¹

On the night of August 8, 1985, Manuel DeLeon (DeLeon) was shot and killed at the Mexico Café in Parlier. Augustine Morales testified he had been working with DeLeon and accompanied him to the bar in order to use the bathroom. When Morales emerged from the bathroom, he saw DeLeon talking to two or three other men whom he could not identify. At some point in the evening Morales was struck and carried from the bar, and as he was being carried out, he heard gunshots. Morales did not overhear any of the discussion between DeLeon and the other men because of the noise in the bar.

Pedro DeLeon (Pedro), a cousin of DeLeon's, was in the Mexico Café when DeLeon came in. Pedro observed DeLeon talking with Morales and with [petitioner]. He also saw [petitioner] strike Morales, causing him to fall against the pool table. DeLeon tried to intervene. [Petitioner] shot at DeLeon from a distance of about three steps and ran from the scene. Pedro heard three shots fired. DeLeon had no weapon; [petitioner] had removed a gun from his own waistband. Pedro testified there were two other men with [petitioner] that evening, who might have been a father and son; one of these men tried to push [petitioner's] hand up to prevent him from shooting DeLeon. Pedro never saw DeLeon hit [petitioner], nor did he ever see [petitioner] fall to the ground.

¹ The facts are taken from the opinion of the California Court of Appeal for the Fifth Appellate District in People v. Leon, No. F007213 (December 1, 1987), a copy of which was lodged as Exhibit #4 to Respondent's Response on May 5, 2008.

1 Manuela Lopez, a waitress in the Mexico Café on the night of
2 August 8, 1985, saw DeLeon talking to [petitioner] before any
3 shots were fired. Lopez identified [petitioner] in the courtroom.
4 Lopez had seen [petitioner] arrive in the bar that evening
5 accompanied by three adults and a young boy. Lopez refused to
6 serve any of the adults because of the presence of the boy, and
7 when [petitioner] insisted on service, Lopez went to talk to the
8 manager.

9 When Lopez saw [petitioner] and DeLeon talking, she feared there
10 might be a fight because [petitioner] appeared to be angry. She
11 was on her way toward the men when the shots were fired. Lopez
12 heard DeLeon "like as if he were saying to forgive him" and
13 [petitioner] "just took out the pistol and fired it" towards DeLeon
14 from about three or four feet away. A boy or young man who was
15 with [petitioner] tried to hold him, but [petitioner] pushed him
16 away. Lopez testified DeLeon had no weapon in his hands nor did
17 Lopez see any weapon near the body when she turned DeLeon over
18 because he appeared to be choking. Lopez did not see anyone hit
19 or kick [petitioner], and she never saw [petitioner] fall to the floor.

20 Sergio Garcia, who was with DeLeon in the Mexico Café on
21 August 8, saw DeLeon get into an argument with [petitioner] and
22 Morales. Garcia identified [petitioner] in the courtroom and
23 testified he had previously seen [petitioner] in the nearby jewelry
24 store which [petitioner] owned. [Petitioner] was with his son, Pete,
25 and another man they called "Guerro." Garcia thought the
26 argument had started when Morales bumped into [petitioner].
DeLeon moved closer to [petitioner] after the bumping incident but
had no weapon. [Petitioner] struck Morales, and DeLeon "threw a
gloved fist at [petitioner]." Garcia never saw DeLeon kick
[petitioner].

Adan Buenrostro, the bartender in the Mexico Café, heard the
gunshots fired the night of August 8 and, after hearing the shots,
saw [petitioner] with a gun in his hand. Buenrostro saw
[petitioner] leave the bar. Buenrostro knew [petitioner] from the
bar and the adjacent Corral Café, and he knew [petitioner] had a
jewelry store. Buenrostro testified he knew [petitioner] to be
nonviolent when he was sober but had heard [petitioner] would get
into fights with friends when he was drunk. Maria Trejo, the
cashier at the Mexico Café, looked toward the bathroom in time to
see [petitioner] draw his weapon. She yelled to Buenrostro just as
she heard the shots fired. Trejo never saw [petitioner] knocked to
the floor before the shooting.

Francisco Mejia was outside the Mexico Café when he heard shots
fired. He saw [petitioner] run out of the bar and recognized
[petitioner] from prior businesses [petitioner] had operated; Mejia
saw [petitioner] get into his car and leave the area with tires
squealing. As [petitioner] left, he bumped into Mejia's car.

1 [Petitioner] was driving a green car, high in the back, with a "For
2 Sale" sign on it.

3 Detective Joe Rascon, who had been assigned to investigate the homicide,
4 conducted a search for a green two-door Dodge and found the car in the
5 early morning hours of August 9, apparently abandoned in the area of
6 Manning and McCall Avenues. Shoe tracks led from the vehicle to the
7 intersection. James Tarver, a criminalist with the sheriff's department
8 who participated in the investigation, testified that a pair of light tan half-
9 boots with a pointed toe seized in a search of [petitioner's] residence
10 shared positive class characteristics (size, sole size, and sole design) with
11 the tracks leading from the vehicle. Tarver could not say positively that
12 the shoes seized from [petitioner's] house had left the prints at the scene,
13 but they certainly could not be excluded. The abandoned Dodge car in
14 question had been lent to [petitioner] by Gabriel Torres who recovered the
15 car from the police impound yard.

16 When police officers responded to the scene of the Mexico Café, DeLeon
17 was found lying on the floor in a pool of blood and showed no signs of
18 life. Homicide detective Scott Morrison later checked the bar for two
19 rounds of ammunition which had not been found in the body. He found
20 one embedded about 18 inches from the floor in a stack of beer cans and
21 the other embedded in the ceiling. Detective Pete Chavez, designated the
22 investigating officer on the case, testified that he had interviewed Sergio
23 Garcia in Spanish at the time of the homicide and, although Garcia told
24 Chavez that [petitioner] had struck DeLeon, he said nothing about DeLeon
25 hitting [petitioner]. Chavez also interviewed Augustine Morales, who
26 stated he had been present during the shooting. Morales told Chavez he
heard [petitioner] cursing at DeLeon, and when Morales approached and
asked what was going on, [petitioner] struck him and told him to shut up.
[Petitioner] then told DeLeon he was "gutless." Morales saw [petitioner]
with a gun and heard the shots.

Dr. Jerry Nelson, a pathologist, testified that the autopsy revealed
DeLeon died as the result of a single gunshot wound entering the
front of the neck at an angle of 5 degrees upward and 10 degrees to
the right, assuming the victim was standing vertically on flat
ground. The wound caused massive hemorrhage and asphyxia
since it passed through the larynx. The bullet struck the fourth and
fifth cervical vertebrae and penetrated the left side of the spinal
cord, partially severing it and throwing the victim into deep shock.

Defense Case

Homero Salinas testified that he had driven to Parlier on August 8
with his brother and his three-year-old son in order to see Pete
Leon and talk to him about acting as godfather at a baptism. At
about 6 p.m., Salinas went to the jewelry store owned by
[petitioner] and Pete; he stayed there talking until 10 p.m. when the
three left to go to the Mexico Café for some dinner. At some point
Salinas and Pete went to the bathroom, and as they emerged they

1 saw [petitioner] walking toward them. Three men were following
 2 him. [Petitioner] stopped when he encountered Salinas and Pete,
 3 and Salinas went and ordered three more beers. The three men
 4 were then surrounding [petitioner] , and one of the three tried to
 5 pick a fight, stating "I'm going to kick your ass." Salinas testified
 6 [petitioner] never swore at DeLeon and instead expressed a desire
 7 to leave the bar. Pete tried to intervene. The man who had
 8 threatened to kick [petitioner's] ass put his hand on Pete's face and
 9 pushed him back. [Petitioner] again tried to leave, but as he started
 10 walking away, another of the three struck [petitioner] twice in the
 11 back of the head. [Petitioner] fell to the ground, he was struck
 12 again in the face, and the man who had struck him began to kick
 13 him in the side. Salinas and Pete restrained the other two men to
 14 prevent them from joining into the fight. Salinas heard shots fired
 15 and ran from the bar.

16 [Petitioner] testified on his own behalf; his testimony was basically
 17 consistent with that of Homero Salinas. [Petitioner] testified that
 18 after he had been knocked to the floor, one of his assailants kicked
 19 him, beat him in the face, and then placed his knee on [petitioner's]
 20 chest. [Petitioner] became short of breath and feared that the man
 21 was going to kill him. [Petitioner] then recalled he was carrying a
 22 pistol since he was wearing about \$12,000 worth of jewelry which
 23 he had not wanted to leave in the jewelry store; he pulled the gun
 24 from his waistband. He fired upward at about a 45 degree angle,
 25 and the first two shots he fired were intended to frighten his
 26 assailant. [Petitioner] saw that the third shot he fired struck the
 assailant; he testified he had not wanted to do this and only shot
 out of fear that he was going to be killed. [Petitioner] started to
 drive home but the car stalled; he then called his son, Pete. Pete
 took [petitioner] home, where [petitioner] had a couple of beers to
 calm down and then called the police from a neighbor's house to
 report his car stolen. [Petitioner] testified, "it was a way of turning
 myself in, because I did not want to flee, because I knew that I had
 done a wrong thing."

19 (People v. Leon, slip op. at 2-7)

20 ANALYSIS

21 I. Standards for a Writ of Habeas Corpus

22 Federal habeas corpus relief is not available for any claim decided on the merits in
 23 state court proceedings unless the state court's adjudication of the claim:

24 (1) resulted in a decision that was contrary to, or involved an
 25 unreasonable application of, clearly established Federal law, as
 26 determined by the Supreme Court of the United States; or

26 /////

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is “contrary to” clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406 (2000)).

Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, ___ U.S. ___, 123 S.Ct. 1166, 1175 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

II. Petitioner’s Claims

The January 23, 2001 decision challenged herein was made at a subsequent parole consideration hearing. (See Exhibit B to Answer to Petition for Writ of Habeas Corpus, filed

February 23, 2005.) In its decision, the Board concluded that petitioner was not suitable for parole and “would pose an unreasonable risk of danger to society or a threat to public safety if released from prison.” (Ex. B to Answer, at 28.) The Board relied principally on petitioner’s commitment offense. (Id.) The Board noted petitioner did not have an arrest or a conviction record, but admitted to coming to the United States illegally and carrying a concealed weapon without a permit. (Ex. B to Answer, at 29.) The Board found petitioner had “not yet sufficiently participated in beneficial self-help []² programming.” (Id.)

The Board found the psychological report of Dr. M. Carswell “not totally supportive of release.” (Id.) Although the report stated petitioner showed good insight into his commitment offense, the Board was concerned that petitioner’s “recollection of the events are nowhere near what the jury heard or the appellate court heard or the presiding judge or what witnesses said.” (Id.) While the report concluded petitioner had a violence potential estimated to be only slightly higher than the average citizen in the community, the Board found that it was slightly higher based on the significant risk factor that if petitioner returned to alcohol, his dangerousness would increase. (Id.) The correctional counselor found petitioner would “pose a moderate degree of threat if released to the public.” (Id. at 30.)

The Board noted petitioner has an INS hold but has residential plans if paroled to Mexico. (Id. at 29.) However, petitioner did not have proof of employment plans. (Id.)

The Board commended petitioner for being disciplinary-free since 1997, and noted he had only received one 115 which he received in 1997. (Id.) Petitioner had

been in AA for quite a while, took a parent education program and then took some courses in transmitted diseases, Hepatitis, TB and sexually transmitted diseases and he also has a laudatory chrono for his progress in the graphic arts offset printing vocation where he has completed some of the units towards that vocation.

(Id. at 30.)

² The words “and therapy” were ordered removed pursuant to the appeals unit. (Answer, Ex. D.)

1 Ultimately, the Board found those positives did not outweigh the following
 2 factors: his commitment offense which was carried out in an especially cruel manner; a recent
 3 psychological report which demonstrated a need for a longer period of observation and
 4 evaluation or treatment; petitioner had not completed programming essential to his adjustment
 5 and needed additional time to gain that programming; and he needed to more fully participate in
 6 self-help programming and to complete a vocation. (*Id.* at 30-31.)

7 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
 8 some transgression of federal law binding on the state courts, see *Middleton v. Cupp*, 768 F.2d
 9 1083, 1085 (9th Cir.1985), and is unavailable for alleged errors in the interpretation or
 10 application of state law, see *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). For this reason,
 11 petitioner's claims arising out of alleged violations of state law are not cognizable in this federal
 12 habeas corpus action.

13 California's statutory scheme governing parole "creates in every inmate a
 14 cognizable liberty interest in parole which is protected by the procedural safeguards of the Due
 15 Process Clause." *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003); see also *Sass v.*
 16 *California Board of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006).

17 [T]he Supreme Court ha[s] clearly established that a parole board's
 18 decision deprives a prisoner of due process with respect to this
 19 interest if the board's decision is not supported by "some evidence
 20 in the record," *Sass*, 461 F.3d at 1128-29 (citing *Superintendent v.*
 21 *Hill*, 472 U.S. 445, 457, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985));
 22 see also *Biggs*, 334 F.3d at 915 (citing *McQuillion*, 306 F.3d at
 23 904), or is "otherwise arbitrary," *Hill*, 472 U.S. at 457, 105 S.Ct.
 24 2768.

25 *Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007).

26 California law allows the Board to consider a myriad of factors
 when weighing the decision of granting or denying parole. Parole
 may be denied if the Board "determines that the gravity of the
 current convicted offense or offenses, or the timing and gravity of
 current or past convicted offense or offenses, is such that
 consideration of the public safety requires a more lengthy period of
 incarceration for [the] individual." Cal. Penal Code § 3041(b).

1 Biggs, at 915.

2 The regulations governing the parole process provide six
 3 nonexclusive factors tending to show unsuitability for parole and
 4 nine nonexclusive factors tending to show suitability. The factors
 5 tending to show unsuitability are: (1) Commitment Offense; (2)
 6 Previous Record of Violence; (3) Unstable Social History; (4)
 7 Sadistic Sexual Offenses; (5) Psychological Factors; and (6)
 8 Institutional Behavior. 15 Cal.Code Regs. § 2402(c). In terms of
 9 the first factor, "Commitment Offense," the regulations explain
 10 that it tends to show unsuitability when "[t]he prisoner committed
 the offense in an especially heinous, atrocious or cruel manner." Id.
 at § 2402(c)(1). The factors indicating suitability for parole are: (1)
 No Juvenile Record; (2) Stable Social History; (3) Signs of
 Remorse; (4) Motivation for the Crime; (5) Battered Woman
 Syndrome; (6) Lack of Criminal History; (7) Age; (8)
 Understanding and Plans for the Future; and (9) Institutional
 Behavior. 15 Cal.Code Regs. § 2402(d).

11 Irons, 505 F.3d at 851 n.4. "Even though these suitability and unsuitability factors are helpful in
 12 analyzing whether a prisoner should be granted parole, California courts have made clear that the
 13 'findings that are necessary to deem a prisoner unsuitable for parole,' Irons, 505 F.3d at 850,
 14 require additional evidence beyond the elements of the commitment offense that demonstrate the
 15 prisoner's release will unreasonably endanger public safety. Irons at 663, quoting In re
 16 Dannenberg, 34 Cal.4th 1061, 1071, 23 Cal.Rptr.3d 417 (Cal. 2005); see also In re Weider, 145
 17 Cal.App.4th 570, 588 (2006) (to support denial of parole, the "factors beyond the minimum
 18 elements of the crime" "must be predicated on "some evidence that the particular circumstances
 19 of [the prisoner's] crime-circumstances beyond the minimum elements of his conviction-
 20 indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he
 21 remains a danger to public safety.")

22 Petitioner claims that there was no evidence to support application of any of the
 23 unsuitability factors to him, that there was substantial evidence to support application of several
 24 of the suitability factors to him, and that the evidence showed he would pose very little danger to
 25 the community if released.

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1 Petitioner was received in state prison on March 26, 1986 following his December
2 26, 1985 conviction for second degree murder while armed with a firearm. (Ex. A to Answer.)
3 Petitioner was sentenced to an indeterminate term of fifteen years to life in prison, plus two years
4 for the weapons enhancement. (Id.) Petitioner's initial parole consideration hearing was held on
5 April 30, 1996, at which time parole was denied for a period of two years. (Ex. B to Answer, at
6 1.) The Board's January 23, 2001 decision was petitioner's fourth denial of parole. (Traverse at
7 4.) Petitioner's bid for parole has been denied two more times since. (Id.)

8 As noted above, the Board relied principally on petitioner's commitment offense
9 and the finding that he poses a significant risk to the community if he resumes his alcohol
10 consumption. The record reflects that there was some evidence before the Board to support the
11 description of petitioner's commitment offense. Petitioner claims that this factor alone is
12 insufficient to support a finding of present dangerousness required to justify the denial of parole.
13 Specifically, petitioner contends that he has been disciplinary-free since 1997 and that the
14 evidence showed he poses little threat to the community. Moreover, petitioner contends there is
15 no evidence to support the Board's finding that he presents a significant risk based on his prior
16 alcohol abuse. Petitioner argues he has attended AA for many years and has suffered no prison
17 disciplinaries for alcohol or substance use during his 22 years of incarceration. (Traverse at 19.)

18 The record before the Board at the time of the 2001 hearing contains substantial
19 evidence contrary to the Board's conclusion that petitioner "would pose an unreasonable risk of
20 danger to society or a threat to public safety if released from prison." In Dr. Carswell's 2000
21 psychological evaluation, petitioner noted he had attended AA for 20 years and had been sober
22 for 16 years. (Lodged Documents at 78 [docket no. 14-3].) The Axis I diagnostic impression
23 was alcohol abuse, in institutional remission. (Id.) "Should this inmate at this time be given a
24 parole or release date, it is expected he will be able to maintain his present gains in the
25 community." (Id. at 79.) The psychological evaluation assessed his level of dangerousness as
26 follows:

1 A. Considering the fact this inmate has not had a CDC-115
2 violation since 1987 [sic], he would be considered a less than
3 average risk for violence when compared to this Level II inmate
4 population.

5 B. If released to the community, his violence potential is estimated
6 to be only slightly higher than the average citizen in the
7 community.

8 C. Obviously, the most significant risk factor as a precursor to
9 violence for this inmate would be a return to the use of alcohol.

10 (Id. at 79.) Petitioner described his commitment offense to the psychologists as follows:

11 the crime was in self-defense. There was a problem with the
12 victim and his son. He did not know the victim and states that he
13 is very sorry about what happened, that today he would have done
14 something very different, and that he prays every day for everyone
15 in his family and the victim's. He also stated that the judge had
16 some questions and was wavering while considering his guilt or
17 innocence, and finally decided that the inmate was guilty.

18 (Id. at 79.) Dr. Carswell made the following observations, comments and recommendations:

19 A. This inmate is responsible for his behavior. He has the ability
20 to abide by institutional standards and has generally done so during
21 his incarceration period.

22 B. This inmate has no mental health disorder which would
23 necessitate treatment either during his incarceration period or after
24 parole.

25 C. Since this inmate appears to have an alcohol problem, periodic
26 alcohol and drug testing as a mandatory part of parole is
recommended.

(Id. at 79-80.)

Petitioner's classification score was reduced to zero on March 17, 1994. (Id. at 5
[docket no. 15-3].) His classification score remained zero as of April 2000. (Id. at 90 [docket
no. 15-5.]

At his March 10, 1993 classification hearing, it was noted that petitioner was
medically inhibited due to back problems. (Id. at 9 [docket no. 15-3]; see also id. at 22 [docket
no. 15-3.]) The 1994 Life Prisoner Evaluation Report noted petitioner had a CDC 128-C dated
August 11, 1994 noting petitioner's chronic low back pain. (Id. at 109 [docket no. 15-5.]

1 At his May 3, 2000 annual classification hearing, petitioner was assigned to
2 vocational print shop. (Id. at 11 [docket no. 15-3].) Petitioner had “two periods of average or
3 above performance in work, school or Vocational Program.” (Id.) Petitioner had been assigned
4 to the Vocational Print Shop since January 5, 1999 with satisfactory ratings. (Id. at 91 [docket
5 no. 15-5.]) In 1998, petitioner worked in culinary. (Id. at 13 [docket no. 15-3.]) Petitioner was
6 previously employed as a tailor and watch and jewelry repairman. (Id. at 22 [docket no. 15-3.];
7 see also id. at 87 [docket no. 15-5.]) At the time of his commitment offense he had a jewelry
8 store in the Fresno area in partnership with his son. (Id. at 20 [docket no. 15-6.])

9 Petitioner has been informed that the Foreign Prisoner Transfer Treaty Program
10 (FPTTP) applies and he could complete his sentence in Mexico, but petitioner declined stating he
11 has family residing in California. (Id. at 15 [docket no. 15-3.])

12 Petitioner has received no serious rules violation reports since he was
13 incarcerated. In 1997, petitioner’s received an administrative 115 for alteration of state material.
14 (Id. at 20 [docket no. 15-3.]; see also id. at 94 [docket no. 15-5.])

15 Petitioner started attending Alcoholics Anonymous in April or May of 1991. (Id.
16 at 5 [docket no. 15-6.]) Petitioner had 100% attendance from May 1991 through June 1991. (Id.
17 at 6.) A May 6, 1992 128B chrono shows petitioner had a 94% attendance at Level III Hispanic
18 AA group from May 8, 1991 to May 6, 1992. (Id. at 6 [docket no. 15-6.]) Petitioner’s central
19 file contains confirmation of petitioner’s active participation in AA from July 1992 through
20 December 1992, having attended 28 of 28 meetings held. (Id. at 26, 44 [docket no. 15-4.])
21 Petitioner participated in AA as documented by CDC 128B’s dated February 24, 1994, May 24,
22 1994, October 21 & 26, 1995, December 22, 1995, October 29, 1996, August 29, 1997, February
23 24, 1998, August 1, 1998, September 30, 1998, December 29, 1998, April 7, 1999, July 6, 1999,
24 and September 30, 1999 and January 21, 2000. (Id. at 2-3 [docket no. 15-6], 107, 103-04, 95-97
25 docket no. 15-5.]) The December 29, 2000 addendum to the parole consideration hearing states
26 that petitioner participated in AA “as documented on CDC 128B dated 5-2-00, 1-21-00, and 9-

1 30-99.” (Id. at 89 [docket no. 15-5.]) The Life Prisoner Evaluation Report, dated April 2000,
2 states petitioner “is a current member of Alcoholics Anonymous and has been a member since
3 October 1993.” (Id. at 91-92 [docket no. 15-5.])

4 Petitioner was assigned to Education as an ESL student from October 5, 1996
5 February 2, 1998, and received satisfactory ratings. (Id. at 92 [docket no. 15-5.]) Petitioner
6 received his GED. (Id. at 95 [docket no. 15-5.]) He was assigned to Lunch Box Crew from
7 February 21, 1998 to October 1, 1998, with satisfactory ratings. (Id. at 92 [docket no. 15-5.])
8 Petitioner received a completion certificate for the Parent Education Program, (id. at 40-42
9 [docket no. 15-4]), and a certificate of achievement for his completion of the Reading Levels A
10 & B of the PLATO computer assisted learning program. (Id. at 43.)

11 Despite petitioner’s model behavior in prison and his continued participation in
12 AA, Correctional Counselor Baker wrote in the April 2000 Life Prisoner Evaluation Report:

13 Considering the commitment offense, prior record and prison
14 adjustment, this writer believes the prisoner would pose a moderate
15 degree of threat to the public at this time, if released from prison.
16 [Petitioner’s] crime consisted of the 1985 shooting of a man during
17 an altercation. [Petitioner] was intoxicated and seems to have
18 become disproportionately angry during the incident. What
19 concerns this writer is that the victim was attempting to apologize
20 to [petitioner] for having brushed against him when he (the victim)
21 was fatally shot for no apparent reason. [Petitioner’s] version of
22 the story: that he shot the victim out of self-defense is not
23 substantiated by the available facts of record. It is my opinion,
24 should [petitioner] return to using drugs (alcohol), his degree of
25 threat to the public would be much higher, therefore, it is
26 recommended that he continue to participate in Alcoholics
Anonymous and Narcotics Anonymous. In addition, [petitioner]
could benefit from anger control therapy since the crime was a
direct result of anger under the influence of alcohol, as indicated in
the previous report.

23 (Id. at 92 [docket no. 15-5.])

24 This report stands in contrast to the psychological evaluation issued January 2,
25 1998, which states petitioner “does not have a mental health disorder which would necessitate
26 treatment either during his incarceration period or following parole.” (Id. at 15 [docket no. 15-

6.) Dr. Terrini stated petitioner “demonstrated some insight into his commitment offense and his judgment appeared to be normal.” (Id. at 14 [docket no. 15-6.]) Dr. Terrini concluded:

1) [Petitioner] is competent and responsible for his behavior. He has the capacity to abide by institutional standards and has generally done so during his incarceration.

2) Given his lack of a criminal history, his lack of a violent criminal history, his relative lack of CDC-115s and his lack of violent CDC-115s, his violence potential is estimated to be below average relative to this inmate population.

3) As [petitioner] apparently had an alcohol problem, monitoring, as well as attendance at Alcoholics Anonymous, should be mandatory conditions of parole.

4) [Petitioner] does not have a mental health disorder which would necessitate treatment either during his incarceration period or following parole.

(Id. at 15 [docket no. 15-6.]) Dr. Kitt, in his 1994 psychiatric evaluation stated that “[a]lthough the possibility of alcohol abuse may have existed at [the time of the offense], it is not a current problem.” (Id. at 18 [docket no. 15-6.]) He opined,

There is no relationship between any psychopathology and the criminal behavior. While incarcerated [petitioner] has psychiatrically improved slightly due to increasing age and possible benefits of attending Alcoholics Anonymous meetings. In a less controlled setting such as a return to the community, he is likely to maintain his gains.”

...

He is not in need of any psychotherapy.

(Id. at 18 [docket no. 15-6.]) These reports track an even earlier psychological evaluation, dated July 21, 1989, where Dr. Davis concluded:

A major mental disorder was not a factor in the commitment offense nor does [petitioner] suffer from such a disorder at this time. His mental status is stable and is likely to remain so. He expresses a desire to utilize his time while incarcerated in a productive manner, and it is anticipated he will do so. He might benefit from attendance at Alcoholics Anonymous in an attempt to ascertain the role alcohol has played in his life. Violence potential is considered below that of the average inmate.

1 (Id. at 21 [docket no. 15-6.]) None of these psychologists reference an anger management
2 problem.

3 The United States Court of Appeals for the Ninth Circuit has held that after an
4 inmate has “served the minimum number of years required by his sentence,” Irons, 505 F.3d at
5 853, extended reliance solely “an unchanging factor, the circumstance of the offense and conduct
6 prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and
7 could result in a due process violation.” Biggs at 917.³ California state courts have made similar
8 observations:

9 [T]he commitment offense, this court has observed, is an
10 unsuitability factor that is immutable and whose predictive value
11 ‘may be very questionable after a long period of time [citation].’
12 [Citation.] We have also noted, as has our Supreme Court, strong
13 legal and scientific support that ‘predictions of future
14 dangerousness are exceedingly unreliable,’ even where the passage
of time is not a factor and the assessment is made by an expert.
[Citation.] Reliance on an immutable factor, without regard to or
consideration of subsequent circumstances, may be unfair, run
contrary to the rehabilitative goals espoused by the prison system,
and result in a due process violation. [Citation.]

15 In re Elkins, 144 Cal.App.4th 475, 498-499 (2006).

16 The 2001 decision to deny petitioner parole was the fourth denial of parole
17 premised almost entirely on petitioner’s commitment offense and alcohol abuse. The record
18 demonstrates that at the time of the June 2001 decision the Board continued to rely on the
19 commitment offense as well as petitioner’s alcohol abuse at the time of the commitment offense,
20 both unchanging factors. There is no evidence in the record that petitioner has abused alcohol
21 while in prison or that he has denied a need to attend AA; rather, the record demonstrates a long
22 and continued history of attendance and participation in AA since at least 1991.

23 While the record is clear that there was a strong causal connection between
24 petitioner’s use of alcohol and his violent crime, his past use of alcohol does not by itself

25 ³ The parole decision at bar was made fifteen years after petitioner’s fifteen years to life
26 sentence commenced. Petitioner has now been incarcerated twenty-two years.

1 reasonably establish current unsuitability because there is no additional evidence to complete a
2 chain of reasoning between his past alcohol use and a finding that because of it he currently
3 poses an unreasonable risk of danger if released.⁴ In other words, in the absence of some
4 evidence to support a reasonable belief that petitioner might start using alcohol again, the fact
5 that he abused alcohol more than 20 years ago does not by itself represent some evidence that he
6 is currently dangerous.

7 Moreover, here the record does not contain any evidence to support reasonable
8 grounds to believe petitioner might start using alcohol if released. There is no evidence that
9 petitioner's former desire for alcohol might still be present. The record reveals that he has been
10 clean and sober for a substantial period of time. There is no evidence that he refused, failed, or
11 did poorly in AA; rather the record demonstrates an active participation therein. And there is no
12 evidence that petitioner ever used any type of illicit substance or alcohol during his incarceration.
13 Nor does the record support a reasonable belief that without further attendance at AA in prison,
14 petitioner might start using alcohol again. "[A]lthough the state expects prisoners to behave well
15 in prison, the absence of serious misconduct in prison and participation in institutional activities
16 that indicate an enhanced ability to function within the law upon release are factors that must be
17 considered on an individual basis by the Governor in determining parole suitability." In re
18 Rosenkrantz, 29 Cal.4th 616, 682, 128 Cal.Rptr.2d 104 (Cal. 2002).

19 The fact that alcohol abuse was involved in petitioner's commitment offense does
20 not constitute some evidence that petitioner might start using alcohol and become violent again,
21 and therefore that he currently poses an unreasonable risk of danger without further treatment.
22 Indeed, if petitioner's past use of alcohol established this unsuitability, the Board could deny
23 parole for the rest of petitioner's life based on this unchanging factor, without regard to
24

25 ⁴ The record provides no other past evidence of alcohol abuse, such as citations or
26 convictions for drunk driving. Petitioner has no criminal record, either juvenile or adult, other
than his commitment offense and illegally entering the United States.

subsequent evidence that petitioner has no current desire for alcohol and that there is little current likelihood of alcohol relapse, let alone a return to violent conduct as a result of it. The Board's passing reference that petitioner "had been in AA for quite awhile" demonstrates the Board failed to appropriately acknowledge petitioner's long and faithful commitment to the AA program.

The Board's reliance on the circumstances of petitioner's criminal offense to support the denial of parole was unsupported by any evidence in the record sufficient to meet the applicable legal standard. In language that on this record appears to be boilerplate, it found that the commitment offense was "carried out in an especially callous manner" and that "the motive for the crime was very trivial in relation to the offense." (Answer, Ex. B, at 28.) These terms have been defined by the California courts as follows:

A prisoner's commitment offense may constitute a circumstance tending to show that a prisoner is presently too dangerous to be found suitable for parole, but the denial of parole may be predicated on a prisoner's commitment offense only where the Board can "point to factors beyond the minimum elements of the crime for which the inmate was committed" that demonstrate the inmate will, at the time of the suitability hearing, present a danger to society if released. In re Dannenberg, 34 Cal.4th [1061] at 1071, 23 Cal.Rptr.3d 417, 104 P.3d 783 (Cal.2005). Factors beyond the minimum elements of the crime include, *inter alia*, that "[t]he offense was carried out in a dispassionate and calculated manner," that "[t]he offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering," and that "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." Cal.Code. Regs., tit. 15 § 2402(c)(1)(B), (D)-(E)."

Irons at 663; see also In re Singler, 161 Cal.App.4th 281, 73 Cal.Rptr.3d 864 (2008) (to support denial of parole, the "factors beyond the minimum elements of the crime" "must be predicated on "some evidence that the particular circumstances of [the prisoner's] crime-circumstances beyond the minimum elements of his conviction-indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he remains a danger to public safety.")

In California, "[s]econd degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements--i.e., willfulness,

premeditation, and deliberation-that would support a conviction of first degree murder.” People v. Nieto Benitez, 4 Cal.4th 91, 102 (1992). “Malice, for the purpose of defining murder, may be express or implied. (§ 188.) It is express ‘when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.’ (§ 188; People v. Mattison (1971) 4 Cal.3d 177, 182, 93 Cal.Rptr. 185, 481 P.2d 193.) Implied malice is present “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (§ 188; People v. Mattison, *supra.*)” *Id.* at 102-103.

Under California law,

“all second degree murders by definition involve some callousness – i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others. [Citation.] As noted, however, parole is the rule, rather than the exception, and a conviction for second degree murder does not automatically render one unsuitable.” (In re Smith (2003) 114 Cal.App.4th 343, 366.)

....

Therefore, to demonstrate ‘an exceptionally callous disregard for human suffering’ [within the meaning of applicable provisions of the California parole statutes], the offense in question must have been committed in a more aggravated or violent manner than that ordinarily shown in the commission of second degree murder.

In re Scott, 119 Cal.App.4th 871, 891 (2004). Such circumstances may include “rehearsing the murder, executing of a sleeping victim, stalking,” *id.*, or evidence that the defendant “acted with cold, calculated, dispassion, or that he tormented, terrorized or injured [the victim] before deciding to shoot her; or that he gratuitously increased or unnecessarily prolonged her pain and suffering.” In re Smith, 114 Cal.App.4th at 367.

Similarly, in In re Scott the court noted that a finding of “triviality” sufficient to justify the denial of parole must also relate to present dangerousness:

The offense committed by most prisoners serving life terms is, of course, murder. Given the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not reasonably be deemed “trivial.” The Legislature has foreclosed that approach, however, by declaring that murderers with life sentences must “normally” be given release dates when they approach their minimum eligible parole

1 dates. (Pen.Code, § 3041, subd. (a).) The governing statute also
2 states that the Board shall set a release date “unless it determines
3 that the gravity of current convicted offense or offenses, or the
4 timing and gravity of the current or past convicted offense or
5 offenses, is such that consideration of the public safety requires a
6 more lengthy period of incarceration for this individual, and that a
7 parole date, therefore, cannot be fixed at this meeting.” (Pen.Code,
8 § 3041, subd. (b).) This language means a “more lengthy period of
9 incarceration” is called for where the gravity of the offense or
10 offenses of the prisoner in question is more indicative of a danger
11 to the public if the prisoner is released than would ordinarily be the
12 case. The reference in Board regulations to motives that are “very
13 trivial in relationship to the offense” therefore requires
14 comparisons; to fit the regulatory description, the motive must be
15 materially less significant (or more “trivial”) than those which
16 conventionally drive people to commit the offense in question, and
17 therefore more indicative of a risk of danger to society if the
18 prisoner is released than is ordinarily presented.

19 In re Scott, 119 Cal.App.4th 871, 893 (2004).

20 Here, the Board described the offense as

21 carried out in an especially cruel manner. It was carried out in a
22 manner which demonstrates a callous disregard for human
23 suffering and the motive for the crime was inexplicable or very
24 trivial in relation to the offense.

25 (Ex. B to Answer, at 28.) These facts do not support a finding that the commitment offense was
26 committed in a “more aggravated or violent manner” than other second degree murders, and
review of the record reveals no evidence that petitioner’s commitment offense was carried out
with the type of gratuitous violence, torture or disregard for the victim that would permit it to be
defined as “especially callous” as that term has been defined by the California courts.

The record before this court shows facts congruent with those described in the
state court’s denial of petitioner’s appeal. The facts suggest that petitioner was, at the time of the
commitment offense, inebriated and angry. Petitioner shot the weapon three times, but only hit
the victim once. Moreover, while petitioner immediately left the scene, he ultimately phoned the
police, and, although he claims he shot the victim in self-defense, he has acknowledged
responsibility for killing the victim.

1 The record before the Board and before this court does show facts sufficient to
2 support petitioner's conviction for second degree murder based on a finding of implied malice in
3 that "no considerable provocation" appeared for the actions that petitioner took which led to the
4 death of the victim. The record does not, however, show any facts which suggest that the
5 circumstances of the commitment offense were sufficiently callous, or the motive for petitioner's
6 actions sufficiently trivial, that twenty-two years after the offense the circumstances of the
7 commitment offense would still suggest that petitioner remained a danger to society.⁵ Absent
8 such facts, the Board's reliance on petitioner's criminal conviction to support the denial of parole
9 violates petitioner's right to due process.

10 In addition, the Board's characterization of Dr. Carswell's report as not totally
11 supportive of petitioner's release on parole misstates the report. Dr. Carswell stated that should
12 petitioner be released on parole, Dr. Carswell expected petitioner would be able to maintain his
13 present gains in the community. (Lodged Documents, at 79 [docket no. 14-3.]) His
14 dangerousness upon release to the community was assessed as only slightly higher than the
15 average citizen in the community. (Id.) And, while a return to alcohol was identified as a
16 significant risk factor, petitioner's record demonstrates his commitment to AA. His lack of
17 prison disciplinaries, including any reference to alcohol use or abuse while incarcerated, supports
18 that AA commitment.

19 Moreover, review of Dr. Carswell's report fails to proffer support for the Board's
20 finding that there "is a need for a longer period of observation and evaluation or treatment" or
21 that petitioner "has not completed programming which is essential to his adjustment and needs
22 additional time to gain that programming." (Respondents' Ex. B, at 31.) Indeed, Dr. Carswell
23

24 ⁵ The Board also referred to petitioner's use of alcohol at the time of the offense. It is
25 unclear, because the Board did not elaborate, how this finding relates in any way to a
26 determination concerning the callousness of the offense or the trivialness of the motivation.
Moreover, the record amply demonstrates that petitioner's history of alcohol abuse has been in
remission for years.

1 stated petitioner “has no mental health disorder which would necessitate treatment, either during
2 his incarceration period or after parole.” (Lodged Documents at 79 [docket no. 14-3].)

3 The correctional counselor’s view that petitioner is required to submit to anger
4 management therapy is refuted by at least three psychologists who unequivocally found petitioner
5 had no need for therapy. Here, petitioner’s model behavior in prison demonstrates that he does
6 not presently have an anger management problem; he has sustained no prison disciplinarys for
7 fights or anger problems, and his work records, mostly satisfactory or above, do not demonstrate
8 petitioner has an anger problem. Petitioner has been essentially disciplinary-free throughout his
9 twenty-two year tenure in prison, and has no pre-offense record of violence or anger management
10 problems. After review of the record, this court finds there is no evidence to support the
11 correctional counselor’s position that petitioner should be required to attend anger management
12 therapy.

13 Given the psychological evaluations, petitioner’s work history while in prison, as
14 well as his prior vocation as a tailor and watch and jewelry repairman, this court finds no
15 evidence to support the Board’s position that petitioner needs more self-help programming or to
16 complete a vocation. Petitioner has faithfully attended AA, which is the self-help program most
17 connected to the commitment offense. There is nothing in the record to demonstrate he needs
18 additional counseling in the prison setting in order to demonstrate that he can maintain his gains
19 in society.

20 Prison officials viewed the fact that petitioner was carrying a concealed weapon
21 during the commitment offense and had illegally entered the United States as a form of criminal
22 history. However, the weapon was part of the crime charged and should not be counted twice
23 against petitioner. Insofar as petitioner’s illegal alien status, there is an INS hold on petitioner
24 suggesting he will be deported upon his release from state prison. Both of these facts are also
25 unchanging factors upon which prison officials may not continue to rely in denying petitioner
26 parole where he does not pose an unreasonable risk of danger to the community.

1 Finally, petitioner has evidenced remorse for his commitment offense.
2 (Respondent's Ex. B, at 7, 22.) Although petitioner continues to characterize his crime as self-
3 defense, he has accepted responsibility for taking the victim's life. Petitioner acknowledges he
4 would do something very different today. (Id. at 22.) The Board's reliance on petitioner's failure
5 to accept responsibility violated California Penal Code § 5011(b). Id.⁶

6 Petitioner is now 65 years old and has served 22 years in state prison. He has
7 obtained a GED and has vocational skills that would provide him the means to support himself.⁷
8 He has family members, both in the United States and in Mexico, who have offered their support
9 and would be willing to allow him to live with him should he be paroled. (Lodged Documents,
10 at 10-22; 25-83 [docket no. 15-5.]; Respondent's Ex. B, at 17; Traverse at 10.) Petitioner has
11 solid parole plans, including a place to live and employment options; petitioner has had an
12 "exemplary" prison record for most of his period of incarceration, with only one minor
13 disciplinary violation taking place in 1997.

14 Petitioner's commitment offense could be a sufficient basis to deny his parole if it
15 indicated a risk of re-offending and a danger to society. It does not. Whether petitioner is
16 currently dangerous enough to society to preclude his parole depends on whether his judgment is
17 likely to fail him as gravely as it did when he drank to excess and shot a stranger at a bar. By
18 itself, however, petitioner's exercise of poor judgment twenty-two years ago is not probative,
19 absent any more recent indicators, of his exercise of poor judgment again at his age of 65.
20 Petitioner's positive prison record over the past two decades indicates that he is suitable for
21 parole.

22
23 ⁶ California Penal Code § 5011(b) provides: "The Board of Prison Terms shall not
24 require, when setting parole dates, an admission of guilt to any crime for which an inmate was
committed."

25 ⁷ Petitioner argues that the Board's requirement that he obtain a vocation or upgrade
26 educationally "defies reality and reason" particularly for an "aged foreign prisoner." (Traverse at
10.) Petitioner is 65, near retirement age, and has chronic back problems, high blood pressure
and other medical issues that limit his ability to work. (Id.)

1 Thus, this court rejects the Board's reliance on the gravity of petitioner's
 2 commitment offense or alcohol abuse to deny parole on this record. Given petitioner's
 3 rehabilitation, and model conduct while in prison, the court finds that his commitment offense,
 4 which occurred twenty-two years ago, does not demonstrate that his release will pose an
 5 imminent danger to public safety. Moreover, the court finds that under the circumstance
 6 presented by this case the Board's reliance on these "stale and static factor[s]" to deny parole
 7 after his minimum term has expired violates petitioner's due process rights. Cf. Irons, 505 F.3d
 8 at 846 ("due process was not violated when these prisoners were deemed unsuitable for parole
 9 prior to the expiration of their minimum terms").

10 In addition, the Board's continued reliance on unchanging factors to deny
 11 petitioner parole violated petitioner's right to due process. Biggs v. Terhune, 334 F.3d 910, 917
 12 (9th Cir. 2003)("A continued reliance in the future on an unchanging factor, the circumstance of
 13 the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused
 14 by the prison system and could result in a due process violation.") This court has reviewed the
 15 record and determined that the record lacked some evidence supporting the Board's denial of
 16 parole. For all of these reasons, the writ should be granted.

17 In accordance with the above , IT IS HEREBY RECOMMENDED that:

- 18 1. Petitioner's application for a writ of habeas corpus be granted; and
- 19 2. Respondents be directed to forthwith set a parole release date for petitioner.

20 These findings and recommendations are submitted to the United States District
 21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days
 22 after being served with these findings and recommendations, any party may file written
 23 objections with the court and serve a copy on all parties. Such a document should be captioned
 24 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that

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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: July 7, 2008.

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6 UNITED STATES MAGISTRATE JUDGE

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